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IN THE

Supreme Court of the United States

OCTOBER TERM 1950

No. 264.

JOHN STOPPELLI,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner John Stoppelli respectfully prays for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit, to review a judgment of that Court, entered on or about June 26, 1950, affirming a judgment of the United States District Court for the Southern District of California, Southern Division, entered in that Court on or about June 13, 1949, convicting petitioner of the crimes of unlawfully selling, dispensing and distributing a quantity of heroin, in violation of 26 U. S. Code, Secs. 2553 and 2557, and concealing and facilitating the concealment of heroin, in violation of 21 U. S. Code, Sec. 174.

Statement of Matters Involved

This is a criminal prosecution wherein five defendants, including petitioner, were indicted in the United States District Court for the Northern District of California, Southern Division, in an indictment containing three counts. The first charged a violation of the Harrison Narcotic Act, the second a violation of the Jones-Miller Act and the third a violation of the conspiracy statute. Motions were made on behalf of the defendants for judgment of acquittal at the conclusion of the government's case and upon the entire evidence, which motions were denied. All defendants were found guilty by the jury on all counts. Motions for a new trial were denied, with the exception of petitioner's motion, which was granted as to the conspiracy count but otherwise denied. Petitioner was sentenced to a term of imprisonment of five years on the first count and six years on the second count, these sentences to run concurrently, and was also fined the sum of $100 on the second count (420-421).

This petitioner duly appealed from the judgment, orders and sentence, and on June 26, 1950, the United States Court of Appeals for the Ninth Circuit affirmed the conviction in an opinion by Goodman, D. J., from which Denman, Ch. J., dissented. Both the prevailing and dissenting opinions are appended to the certified transcript of record.

A subsequent petition for rehearing was filed on or about July 21, 1950, and was denied on August 2, 1950. Meanwhile, for the protection of petitioner's rights herein, on July 20, 1950, Chief Justice Vinson duly signed an order extending the time for the filing of a petition for certiorari herein to and including August 25, 1950.

Questions Presented

The questions involved and the grounds of appeal are briefly as follows:

1. Petitioner's conviction, resting as it did upon the single circumstantial fact of the presence of a fingerprint

upon an envelope, unsupported by the slightest direct testimony, is wholly lacking in sufficient legal basis.

2. The improper admission of testimony tending to indicate the commission of other crimes by petitioner, and the denial of a mistrial on this ground, constituted substantial and reversible error.

3. The Government's failure to introduce any evidence whatsoever to establish the venue of the alleged offense, or even defendant's presence in the State of California at any time, was fatal to the conviction.

Reasons for Allowance of Writ

The basic reasons offered by petitioner for the allowance of certiorari herein are substantially coextensive with the propositions outlined above as the questions presented.

We respectfully refer the Court to the learned dissenting opinion of the Chief Judge of the Court of Appeals herein (appended to the certified transcript of record) for a forceful exposition of the important reasons why the prevailing opinion represents an utterly improper and unsound declaration of the supposed law.

In addition to and in conjunction with the foregoing considerations, petitioner urges that the unwarranted extension of the rules relating to quantum of proof in criminal cases so as to include a conviction upon such wholly insufficient evidence, has the effect of establishing a rule of law which is fraught with dangerous consequences to the liberties of persons accused of crime. The rulings sought to be reviewed raise an important question of federal law which has not been explicitly, but should be, settled by this Court. The decision is also evidently in conflict with rulings of the several Courts of Appeals in the Second, Third, Fifth, Eighth and Tenth Circuits, as well as with the reasoning of applicable decisions of the Supreme Court of the United States. Finally, the holding sought to be reviewed to the effect that petitioner's rights were not invaded on any of the points herein, as well as that he was

not prejudiced by the improper evidence received, so far sanctions a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

"There exists in this court, however, especially in cases where life and liberty are involved, an inherent power to consider the sufficiency of the evidence to sustain a verdict of guilty." *Edwards* v. *U. S.*, 7 F. 2d 357. To that indisputably right and humane doctrine petitioner adds the proposition, equally sound and well-established, that in a close case—the most charitable view to be taken of the Government's proof—especially sedulous care must be exercised to discover whether any important right of petitioner has been denied or prejudiced, for under these circumstances an error that might elsewhere be condoned or disregarded could easily have sufficed to turn the scales of the verdict against him. "Finally, if the record shows error, but does not disclose whether the error is prejudicial or whether it is not prejudicial, it is presumed to be prejudicial and to require reversal." *Ah Fook Chang* v. *U. S.*, 91 F. 2d 805.

Wherefore, your petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of said Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Court of Appeals be reversed; and that petitioner may be granted such other and further relief as may seem proper.

Dated: New York City, August 22, 1950.

JOHN STOPPELLI,
Petitioner.

By JACOB W. FRIEDMAN,
Counsel for Petitioner.

IN THE

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Respondent.

BRIEF IN SUPPORT OF PETITION

Opinions Below

Both the prevailing and the dissenting opinions of the Court of Appeals herein are appended to the certified transcript of record, and are apparently not yet reported. No opinion was rendered herein by the District Court.

Jurisdiction

The judgment of the Court of Appeals now sought to be reviewed was rendered on June 26, 1950, and a petition for rehearing, duly filed on July 21, 1950, was denied on August 2, 1950. The Chief Justice, on July 20, 1950, signed

an order extending the time for the filing of a petition for certiorari to and including August 25, 1950. The jurisdiction of the Supreme Court of the United States is invoked under 28 U. S. Code, Sec. 1254, subd. 1 (June 25, 1948, c. 646, sec. 1, 62 Stat. 928).

Statutes Involved

26 U. S. Code, Sec. 2553 (a), known as the Harrison Narcotic Act, provides as follows:

> "It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax."

21 U. S. Code, Sec. 174, known as the Jones-Miller Act, provides as follows:

> "If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction contrary to law, or assists in so doing or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction, be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Statement of the Case

A summary statement of the case is set forth in the petition, supra. A summary of the argument is contained in the index.

Specification of Errors to be Urged

It is intended to urge the following errors:

1. Petitioner's conviction, resting as it did upon the single circumstantial fact of the presence of a fingerprint upon an envelope, unsupported by the slightest direct testimony, is wholly lacking in sufficient legal basis.

2. The improper admission of testimony tending to indicate the commission of other crimes by petitioner, and the denial of a mistrial on this ground, constituted substantial and reversible error.

3. The Government's failure to introduce any evidence whatsoever to establish the venue of the alleged defense, or even defendant's presence in the State of California at any time, was fatal to the conviction.

ARGUMENT

1

Petitioner's conviction, resting as it did upon the single circumstantial fact of the presence of a fingerprint upon an envelope, unsupported by the slightest direct testimony, is wholly lacking in sufficient legal basis.

The facts are quite simple. On October 31, 1948, one George H. White (74-96), a narcotic district supervisor, accompanied by an informer, went to Room 306 of a certain

hotel in Oakland, California. As he entered the building, defendant Ballard came out, stepped into an automobile, drove away and returned in a few minutes with defendants McDonough and Ingoglia. Ballard and Ingoglia then entered the hotel. By this time White was in Room 306, making arrangements with defendant Leeper to buy a quantity of heroin from him. There was a knock at the door. Leeper opened it, reached outside and brought in a package containing twelve letter-size envelopes, in each of which there was a sealed cellophane envelope containing diluted heroin. The letter-size envelopes were of the ordinary variety purchasable in any stationery or five-and-ten-cent store. Ballard and Ingoglia were found immediately in the hallway.

It will be observed that up to this point there is no mention whatsoever of petitioner. We may add that there was no evidenec at all that petitioner knew or had any dealings with any of the defendants or their agents. Nor was there any evidence that either White or any other witness or, indeed, any person spoke to, saw or had any transaction with petitioner. There was no evidence that petitioner was in California on October 31, 1948, or at any other time prior to his being arrested outside of the state and brought in for the present prosecution.

The sole evidence against petitioner was simply this: W. Harold Greene, a fingerprint expert whose official position (245) was chief of identification of the Bureau of Internal Revenue of the Treasury Department, attached to the Alcohol Tax Unit, testified that a portion of a fingerprint found on the outside of one side of one of the letter-size envelopes was made by one of the fingers of petitioner's left hand (253).

We must also state that the witness ventured the opinion that the envelope contained something when the print was placed on it, claiming to perceive some latent intensity or concavity in the print which might have been absent had it been placed upon an empty envelope—although the contents would not have necessarily been the drug in question

or any other specific substance (264-265). He stated that the paper of the envelope was of a soft texture (261). This witness was an extremely eager one, making the identification before being asked and before being shown the exhibit (249), and being several times (254, 266) admonished by the Court for his evident zeal and attempts to introduce highly prejudicial innuendoes against petitioner.

The basic question thus presented, which resulted in a division of the Court of Appeals is this: Is the presence of a fingerprint on an envelope sufficient warrant for conviction of possession of narcotics which the envelope is subsequently found to contain?

Our position is that this question calls for an emphatic negative reply. The Ninth Circuit itself decided to that effect in *Karn* v. *United States*, 158 F. 2d 568, when it declared:

> "The prosecution relied entirely upon circumstantial evidence for a conviction. It is sufficient to say that under such circumstances the evidence must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence. The evidence should be required to point so surely and unerringly to the guilt of the accused as to exclude every reasonable hypothesis but that of guilt. * * * Our considered judgment is that the evidence in this case falls far short of meeting this exacting standard."

The Eighth Circuit is committed to the same rule, as appears from its holdings in *Union Pacific Coal Company* v. *United States*, 173 F. 737; *Grantello* v. *United States*, 3 F. 2d 117, 118, and *Gargotta* v. *United States*, 77 F. 2d 977, Sanborn, Circ. J., writing in the first cited case:

> "Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction."

The identical view was expressly approved by the Second Circuit in *Nosowitz* v. *United States*, 77 F. 2d 977, and by the Tenth Circuit in *Leslie* v. *United States*, 43 F. 2d 288.

Similarly, the Third Circuit, in *Graceffo* v. *United States*, 46 F. 2d 852:

> "Where all the evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment against the accused."

Likewise, the Fifth Circuit, in *Kassin* v. *United States*, 87 F. 2d 183, held (by Hutcheson, Circ. J.):

> "In each case, however, where the evidence is purely circumstantial, the links in the chain must be clearly proven, and taken together must point not to the possibility or probability, but to the moral certainty of guilt. That is, the inferences which may reasonably be drawn from them as a whole must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence."

We can state with the utmost assurance that the books may be searched in vain for another instance where a conviction was upheld upon the basis of a fingerprint and nothing more. For example, in *United States* v. *Perillo*, 164 F. 2d 645 (cited nevertheless in the prevailing opinion in the case at bar), the Second Circuit Court said with regard to appellant Venetucci:

> "Appellant's fingerprint being on the bag was not the only fact tending to show his guilt. The evidence of the informer shows that the appellant had some conversation with Perillo while the latter was making the arrangements which resulted in the sale and delivery of the narcotics. * * * Such proof was enough to make what Perillo said to the informer at the time the sale was being negotiated admissible, on familiar principles, against the appellant on the conspiracy count."

Most common of all in the cases wherein fingerprints are relied upon to procure a conviction is the production of complete independent proof that the defendant did not have

proper or legitimate access to the locality where the incriminating prints were found. For example, the Government herein relied strongly on *People* v. *Jones,* 257 App. Div. 5, 12 N. Y. S. 2d 635, devoting two pages to it in the brief below (pp. 46-48), but there the Court was careful to point out:

> "The people also established that the prisoner did not have lawful access to and had not been at the place burglarized under such circumstances that the presence of the fingerprint upon the door of the safe could be accounted for upon any hypothesis of his innocence."

The Government also cited the Australian decision in *Parker* v. *The King,* 14 C. L. R. Austr. 681, another burglary case where defendant's print was found in the store where the contents of the safe were pilfered. Likening the print to a signature the Court said:

> "* * * There is in this case evidence that the prisoner's signature was found in the place which was broken into, and was found under such circumstances that it could only have been impressed at the time when the crime was committed."

Thus, in *Moon* v. *State,* 22 Ariz. 418, 198 P. 288, in addition to the fingerprint there was other evidence tending to prove that defendant had committed the burglary in question, while in *McGarry* v. *State,* 82 Tex. Cr. 597, 200 S. W. 527, it was held that the connection of defendant with the burglary of a depot office, which had been entered by breaking a window glass from the outside and unfastening the door from the inside, was not supported by evidence that upon one of the panes of the window there were fingerprints which were identified by expert testimony as identical with those of defendant, where it appeared that there were other prints upon the pane and it was not practicable to tell when and by whom these were made and when those claimed to have been made by the defendant were placed upon the window, the window being so situated as to be accessible to others.

The law as to sufficiency of fingerprint evidence to sustain a conviction is thus flatly stated in *Underhill on Criminal Evidence,* 4th Ed., Sec. 870:

> "The fingerprints corresponding to those of the accused must have been found in the place where the crime was committed, under such circumstances that they could only have been made at that time, to warrant such conviction."

In short, the crucial defect in the Government's proof was the complete omission to negative the possibility that petitioner's print was placed on the envelope under innocent circumstances. Suppose somebody had requested that he purchase for him a dozen envelopes. Or suppose petitioner had been asked for a few envelopes. Or assume that petitioner had placed his hand or his finger casually on the envelope—empty or filled, it matters not—as it lay on a table or desk in the home or office of another. A thousand completely innocent sets of facts, which it is needless to multiply, can be envisioned whereby anyone's fingerprint may appear on an envelope. And the Government's own proof shows that such a print might be recognizable on that paper for five weeks (285). When we consider how we go about our daily occupations and how our fingers come into innocent contact with hundreds of papers and objects, it is sickening and appalling to reflect that any one of us may be subjected to criminal prosecution and conviction on so sorry a substitute for evidence. Surely individuals must not be constrained to go about wearing gloves constantly to safeguard themselves against unjust accusations.

If the presence of a print on a common envelope were (though it obviously is not) a damning circumstance—comparable to a stranger's print on the interior of a bank safe, there might be some logic in surmising guilt in the absence of adequate explanation. As was held in *People* v. *Razezicz,* 206 N. Y. 249, 273:

> "In a criminal case circumstantial evidence to justify the inference of guilt must exclude to a moral certainty every other reasonable hypothesis. Cir-

cumstantial evidence in a criminal case is of no value if the circumstances are consistent with either the hypothesis of innocence, or the hypothesis of guilt; nor is it enough that the hypothesis of guilt will account for all the facts proven. Much less does it afford a just ground for conviction that unless a verdict of guilty is returned, the evidence in the case will leave the crime shrouded in mystery. (Encyc. of Evidence, vol. 3, p. 92.)

"The public interest and safety require that the perpetrator of the horrible crime should, if possible, be brought to justice, but our duty in connection therewith is no greater than our duty to protect the innocent. The defendant must be presumed innocent until he is proven guilty. The inferences from the facts shown are not sufficiently conclusive as we have seen to exclude all other inferences and to justify the judgment obtained against him. The testimony as a whole is consistent with the defendant's innocence."

So, when the prosecution relies on circumstantial evidence, its burden is even greater than proof of guilt beyond a reasonable doubt, for it "must exclude to a moral certainty every other reasonable hypothesis." Where is the slightest semblance of exclusion of the hypothesis that petitioner's print came on the envelope innocently?

Nor is the Government's case aided by the statutory presumption calling for an explanation whenever "the defendant is shown to have or to have had possession of the narcotic drug." An analogy is afforded by a similar statute making mere possession "presumptive evidence of possession thereof knowingly" in the case of policy slips in New York, for in *People* v. *Leavitt*, 301 N. Y. 113, 92 N. E. 2d 915 (unofficial advance sheets of July 11, 1950), the Court of Appeals held (by Conway, J.):

"Since possession in itself is made a criminal offense it is essential that defendant's possession be '*conclusively*' shown * * *. To put it another way it must be conscious possession. In the case at bar the evidence fails to show that defendant had physical possession, custody or control of the policy slips. He was

> not the owner of, or in control of the truck on which the slips were found. There was no evidence to connect him with the house, as owner, lessee, or occupant * * *
>
> "By reason of the inconclusive and circumstantial nature of the evidence adduced, the People failed to establish defendant's guilt beyond a reasonable doubt."

In the light of the casual and fortuitous manner in which any one's fingerprints happen to appear on any object, most certainly there was no showing of "conscious possession" of the drugs by petitioner herein, in the absence of which the conviction should not be permitted to stand.

So far as the prevailing opinion below stresses "the dead page," "the printed word—cold and colorless" and "the unrevealing words of the cold record," all with a view towards exalting the determination of the triers of the facts, we admit that such observations are in order when a factual determination is being challenged, wherein the demeanor of witnesses may be controlling, but they surely have no pertinence where the point is manifestly one of law. In the latter case any court, original or appellate, has equal opportunity to weigh the problem. The only conceivable significance of reference to the circumstances surrounding the ruling—i. e., that the fingerprint evidence alone was adequate to justify submission to the jury—must be a tacit recognition that the jury could properly consider the extraneous matters influencing their verdict and discussed below.

Upon the entire record we can fully appreciate the eloquent indignation that animated the dissenting Chief Judge when he contemplated the holding herein that the Government's burden of proof beyond a reasonable doubt was established and the presumption of innocence overcome, and impelled him to declare it "abhorrent to the Anglo-Saxon sense of justice."

2

The improper admission of testimony tending to indicate the commission of other crimes by petitioner, and the denial of a mistrial on this ground, constituted substantial and reversible error.

In the course of the testimony of Greene, the fingerprint expert, the following occurred (253-254):

> "Q. Now, how did you come to that conclusion that the print on the envelope is the print that belongs to John Stoppelli, the defendant? A. We have a national book, every district supervisor in the country, in the Narcotic Bureau, has a national book published by the Narcotic Bureau, all of the major known——"

Then there was an interruption and counsel for petitioner assigned the statement of the witness as prejudicial misconduct (254). The trial judge struck out the answer and instructed the jury to disregard it (254). A few minutes later the same witness volunteered in the course of an answer (265):

> "In my opinion, he grasped it this way (indicating), which would be the natural way for placing something in the envelope with the right hand and, after all, men of experience of that type——"

Again there was an interruption. When the witness left the stand the jury was excused (294-295), and petitioner's counsel promptly moved (299) "for a mistrial on behalf of the defendant Stoppelli based upon the statements made by the government witness Greene."

We submit that the placing before the jury of testimony of this sort constituted a grave invasion of petitioner's rights. He was entitled to a trial on the material issues, unaffected by the introduction of irrelevant and improper matter having no direct bearing on the question of guilt or innocence. Not taking the sand, he could not be confronted with evidence of previous derelictions. Neverthe-

less, by reason of the unfortunate occurrences referred to above, the jury was effectively apprised that the Narcotics Bureau had a record of all major known narcotic peddlers or violators and that petitioner was one of them—in other words, a man with a criminal record, a man with criminal propensities, an outstanding narcotic criminal. It is difficult to conceive of anything more truly calculated to insure a conviction—especially in a case resting upon such flimsy (if sufficient) evidence—than imparting to the jury that petitioner was an old hand at this sort of thing. It is not to be wondered at that this Court, in the leading case of *Boyd* v. *Boyd*, 142 U. S. 450, 35 L. Ed. 1077, barred such proof. There, on a trial for felony, evidence of other crimes committed by the defendant, was held inadmissible for the identification of the defendant or for any other purpose whatever where those crimes were wholly apart from the inquiry as to the current crime and the defendant might have committed the others and yet have been innocent of this one. Moreover, the error of admitting such evidence was held not to be cured by the judge's charge that defendant was not to be convicted because of the commission of such other crimes.

As a general proposition, this Court further held that the prosecution could not, in a criminal case in any Federal court, resort to any kind of evidence of a defendant's evil character to establish a probability of guilt. *Greer* v. *United States*, 245 U. S. 559, 62 L. Ed. 469. The only point at which such proof is admissible is in connection with impeachment of a defendant or his witnesses—and not as part of the prosecution's case (barring, of course, the exceptional instances where it becomes necessary to prove motive, intent and the like). As Mr. Justice Jackson stated, in *Michelson* v. *United States*, 335 U. S. 469, 93 L. Ed. 168:

> "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption

> of good character, Greer v. United States, 245 U. S. 559, 62 L. Ed. 469, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

The same Justice also recently remarked, in his concurring opinion in *Krulewitch* v. *United States*, 336 U. S. 440, 93 L. Ed. 790:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. Blumenthal v. United States, 332 U. S. 539, 559, 92 L. Ed. 154, all practicing lawyers know to be unmitigated fiction."

The cases wherein the reception of evidence of this type has been condemned are so numerous, and the rule so firmly entrenched in our law, as to dispense with the need for extended citation. Several well-reasoned illustrative authorities are *Templeton* v. *United States*, (C. C. A. 6) 151 F. 2d 706; *Smith* v. *United States*, (C. C. A. 9) 10 F. 2d 787; *United States* v. *Dressler*, (C. C. A. 7) 112 F. 2d 972; *Sang Soon Sur* v. *United States*, (C. C. A. 9) 167 F. 2d 431.

The error was intensified by the liberties improperly taken by the Government in the opening statement to the effect that it would conclusively prove "that a quantity of that heroin in question in that envelope, in one of the envelopes, was handled by the defendant John Stoppelli" (34); "even though the man is in New York, * * * he set

the criminal force loose and the force was consummated or the act was consummated in California" (30); and (arguendo) "if there is a person in the State of New York who sends narcotics to the State of California, * * * that person who sends the narcotics * * * is as guilty as the person who possesses the narcotics in California" (30-31). No proof was offered to substantiate these speculative promises of the prosecution.

In debating whether this is to be dismissed as harmless error, although the question is scarcely arguable, we cannot forbear to remind the Court that petitioner was laboring under the additional hardship of being tried with several other defendants whose guilt was reasonably clear, and that the conspiracy dragnet, with its inherent handicaps to any defendant, rendered it peculiarly imperative that every right be scrupulously and sedulously protected. The whole problem was considered at some length by Mr. Justice Jackson in the recent *Krulewitch* case, 336 U. S. 440, 93 L. Ed. 790, from which we have quoted above. As to this phase he said:

> "A codefendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, codefendants can be prodded into accusing or contradicting each other, they convict each other. There are many practical difficulties in defending against a charge of conspiracy which I will not enumerate."

One of the most recent expressions on the subject is the opinion of the late Mr. Justice Rutledge in *Kotteakos* v. *United States*, 328 U. S. 750, 764, 90 L. Ed. 1557:

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a

> constitutional norm or a specific command of Congress * * * But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

We submit that the application of the foregoing salutary principles herein compels the conclusion that the objectionable matter was necessarily prejudicial. A fair-minded, dispassionate consideration of the meager evidence and the necessary impact thereon of the insidious suggestion of other crimes, does even more than invite the owerpowering inference of a serious effect upon the jury; it appears quite evidently to have been the principal basis of the verdict. Should the judgment proposed to be reviewed be permitted to stand, the reported opinion would operate as an anomalous deviation from established law as previously expounded by this Court and the several Courts of Appeals.

3

The Government's failure to introduce any evidence whatsoever to establish the venue of the alleged offense, or even defendant's presence in the State of California at any time, was fatal to the conviction.

The record discloses the complete absence of proof of venue to establish the jurisdiction of the District Court for the Northern District of California. The transcript fails to show that petitioner was ever in the State of California except for the purpose of the trial. It is petitioner's basic right to be tried within the jurisdiction of a court in which the alleged crime was committed. Constitution of the United

States, Amendment VI; Federal Rules of Criminal Procedure, Rule 18. To sustain the conviction it would be necessary to infer not only that petitioner had possession of the drug but also that such possession was in the Northern District of California—an inference upon an inference, if there ever was one.

Brightman v. *United States* (C. C. A. 8) 7 F. 2d 532, states the law to be as follows:

> "The presumption of the statute alone, however, was not sufficient for conviction. Before the defendant could properly be convicted, it was necessary for the Government to go further and prove that venue was the Western District of Oklahoma. This was a prerequisite to a conviction, and the foundation of this prerequisite is contained in the 6th Amendment to the Constitution of the United States which provides: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

At the conclusion of the Government's case petitioner moved for the direction of a verdict of not guilty and the motion was denied (306); the record includes an assignment of error in that there was no proper venue in the Northern District of California (426).

The prevailing opinion below disposed of the point in two ways. To begin with, the Court said that the point was without merit in view of 18 U. S. Code Sec. 3237, providing that "any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued or completed." The difficulty with this reasoning is that the Government completely failed to prove any criminal act of this petitioner in the State of California, either by himself or by any agent; it likewise failed to prove that any

one's offense was committed in two districts. The Court's second answer is that any objection to venue was waived by "going to trial on the merits without raising any question of venue." The cases cited supposedly in support of this proposition are all readily distinguishable, not one of them dealing with a situation wherein the deficiency in the proof could not have possibly been apparent to the defendant until the prosecution had rested. The Court quite evidently overlooked the square holding in *Brightman* v. *United States* (C. C. A. 8) 7 F. 2d 532, that a motion for a directed verdict of acquittal was sufficient to raise the question of lack of venue. Even more specifically, in *United States* v. *Jones* (C. C. A. 7) 174 F. 2d 747, Mr. Justice Minton (then Circuit Judge) wrote:

> "We think the motion for acquittal made at the conclusion of all the evidence properly raised the question of venue in the court below. It is a challenge to the Government in the presence of the court that the Government has failed in its proof. The motion is not required by the rules to be in writing or to specify the grounds therefor. That in itself would indicate that the defendant is not required to go over the proof for the benefit of the Government or the court, in the absence of some request for more specific objection. * * * Surely, the defendant does not have to lead the Government through the various steps of the trial to insure a proper record for the Government to stand upon. The Government cannot be heard to say it does not know the significance of a motion for acquittal. It follows that if there was a failure in the proof of venue by the Government, such failure required an acquittal, and the court should have sustained the defendant's motion."

This ruling should be adequate to dispose of any erroneous notion of waiver herein.

CONCLUSION

For the reasons stated in the petition and in this brief, it is respectfully submitted that the application for a writ of certiorari should be granted.

Dated: New York, N. Y., August 22, 1950.

Respectfully submitted,

JACOB W. FRIEDMAN,
Attorney for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 264

JOHN STOPPELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 430-446) are reported at 183 F. 2d 391.

JURISDICTION

The judgment of the Court of Appeals was entered June 26, 1950 (R. 446-447), and a petition for rehearing was denied August 2, 1950 (R. 447). The petition for a writ of certiorari was filed August 23, 1950. The jurisdiction of this Court

is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to support petitioner's conviction.

2. Whether the trial court erred in denying petitioner's motion for a mistrial on the ground that statements made by a Government witness were prejudicial.

3. Whether petitioner's attack upon the venue is valid.

STATUTES INVOLVED

21 U.S.C. 174 provides:

> If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall, upon conviction, be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

The Internal Revenue Code, Title 26, U.S.C., provides in pertinent part:

§ 2553. *Packages*—(a) General requirement.

It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

§ 2557. *Penalties.*

* * * * *

(b) *Violations in general.*

(1) Any person who violates or fails to comply with any of the requirements of this subchapter * * * shall, on conviction, be fined not more than $2,000 or be imprisoned not more than five years, or both, in the discretion of the court.

STATEMENT

Petitioner and the defendants Raymond A. Leeper, James Marvin Ballard, Andrew Ingoglia and Patrick John McDonough were found guilty

(R. 9, 378-379) on a three-count indictment returned against them in the District Court for the Northern District of California charging the sale (count 1, 26 U.S.C. 2553) and concealment (count 2, 21 U.S.C. 174), on or about October 31, 1948, in Oakland, California, of a quantity of heroin and conspiracy to commit the offenses charged in counts 1 and 2 (count 3, 18 U.S.C. 371) (R. 2-6). The court thereafter granted petitioner's motion for a new trial as to the conspiracy count only because of doubt as to the sufficiency of the evidence to support the charge (R. 417). Petitioner was sentenced to imprisonment for five years on count 1 and to imprisonment for six years and to pay a fine of $100 on count 2, the sentences to run concurrently (R. 420-421).

The evidence for the Government may be summarized as follows:

On October 31, 1948, in Oakland, California, petitioner's co-defendants, in the presence of George H. White, a narcotic agent (R. 73-74), participated in an attempted sale of approximately 10 ounces and 436 grains of heroin. The drug was contained in 12 cellophane bags and each such bag was enclosed in a separate, identical soft-textured white envelope. All the envelopes were in turn contained in a brown non-original unstamped package. (R. 37-44, 56-73, 76-84, 88-92, 98-106, 112, 115-115, 122-124, 148-153.) The package had been brought from New York by one Tony Sapoli (R.

77, 99, 210-212). Upon examination of the package and its contents, government experts found several fingerprints but only one print could be identified at the trial (R. 153, 183-185, 248-249, 266, 280-281, 294). W. Harold Greene, chief of identification of the Bureau of Internal Revenue, Treasury Department, for the past ten years, who examines approximately 100,000 prints a year and who has made a special study of fingerprints since 1935 (R. 245-246, 267), testified, and his testimony is uncontroverted,[1] that the one identified fingerprint was found on one side of one of the white envelopes and was the print of the ring finger of petitioner's left hand (R. 250-253, 281). He identified the print as petitioner's because it contained 14 characteristics, which he described in detail, similar to those of petitioner's known fingerprint. He testified that only six similar characteristics are usually sufficient for identification purposes (R. 254-260), and that there is only one instance on record of two persons having identical fingerprints, those being prints of identical twins (R. 247). He explained in great detail that because of the intensity and concavity of the print it was impressed on the envelope when it contained a powdery substance (R. 264-265), that the print was placed not more than about four weeks prior to the time the envelope was treated with silver nitrate for fingerprint examination on November 1, 1948 (R. 150-151, 261), and

[1] The defense did not present any expert testimony on this matter.

that the print was made from petitioner's contact with the envelope and not from any transposition or forging of his print (R. 262-263, 286-287).

During Greene's direct examination, the following occurred upon which petitioner subsequently based his motion for a mistrial (R. 253-254):

> Q. Now, how did you come to that conclusion that the print on the envelope is the print that belongs to John Stoppelli, the defendant?
>
> A. We have a national book, every district supervisor in the country, in the Narcotic Bureau, has a national book published by the Narcotic Bureau, all of the major known—
>
> Mr. Karesh [Assistant United States Attorney]: Just a minute, pardon me—
>
> Mr. Ehrlich [counsel for petitioner]: I—
>
> The Court: Yes.
>
> Mr. Karesh: Just a minute. Q. I am asking you how did you make your—
>
> Mr. Ehrlich: Pardon me a moment, Mr. Karesh. I ask that, 1, the witness be instructed not to volunteer, and, 2, I assign the statement made by the witness as prejudicial misconduct, and on the part of the district attorney inquiring for it, and, 3, I respectfully ask the court to instruct the jury to disregard it.
>
> The Court: Yes. I first instruct the witness to confine his answers to questions. Don't go beyond the scope of the question asked by counsel. I strike the answer this witness just made in so far as he made an answer, and I instruct the jury to entirely disregard the answer which I have just stricken from the

record. Any and all matters that are stricken from the record must be entirely disregarded by the jury. Proceed.

Later, when Greene was asked by Mr. Karesh to explain how the envelope was grasped at the time the fingerprint was placed on it, the following occurred (R. 265-266):

> Q. (By Mr. Karesh): How did he grasp that, in your opinion?
>
> A. In my opinion, he grasped it this way (indicating), which would be the natural way for placing something in the envelope with the right hand and, after all, men of experience of that type—
>
> Mr. Ehrlich: Your Honor—
>
> Mr. Karesh: We will ask that go out.
>
> Mr. Ehrlich: Your Honor, this witness is too anxious. May I suggest that he be cautioned?
>
> The Court: Yes, be very careful. You have had experience as a witness in such matters. Be careful and restrict your answers to the question asked.

At the conclusion of the Government's case the court denied petitioner's motion for a mistrial (R. 299) based upon Greene's testimony described above (R. 8, 305), because the witness was stopped before he could say anything that was prejudicial to petitioner and the jury were instructed categorically to disregard his volunteered statements (R. 299-300, 303-305).

Petitioner did not testify and no explanation was offered for the presence of his print on the envelope. While there was no evidence as to his whereabouts on October 31, 1948, it was shown that he was arrested on the indictment in New York, where he posted bond for his appearance in San Francisco, and that he appeared for arraignment on February 24, 1949 (R. 6-7, 54-55).

Without objection by petitioner (R. 375), the court charged the jury in part as follows:

> Where the evidence is susceptible to two reasonable inferences, one pointing to the guilt and the other to the innocence of a defendant, the jury should adopt the one of innocence and find him not guilty.
>
> Evidence stricken by the court must be entirely disregarded by you and you must treat such evidence as if you had never heard or seen it.
>
> * * * * *
>
> There are two classes of evidence recognized and received in courts upon either of which a defendant may be convicted of crime. One is direct evidence and the other is circumstantial evidence. When a witness testifies as to what he perceived through his own senses, that is direct evidence. All other evidence is circumstantial evidence. Before you may find a defendant guilty upon circumstantial evidence the circumstances must be consistent with each other and with the guilt of the defendant, and inconsistent with any reasonable

> theory of his innocence, and must show his guilt beyond a reasonable doubt. [R. 355-356.]
>
> * * * * *
>
> Unless you find beyond a reasonable doubt, or if you entertain a reasonable doubt that a defendant knowingly and intentionally committed the offense alleged, or knowingly and intentionally did something to aid or abet the other defendants, you may not find him guilty of such offense [R. 367].

On appeal by petitioner alone, the Court of Appeals affirmed his conviction, one judge dissenting (R. 446-447).

ARGUMENT

Petitioner, adopting the argument of the dissenting judge below, contends (Pet. 7-14) that the fingerprint evidence is as consistent with innocence as with guilt and that the decision affirming his conviction is in conflict with earlier decisions of the Ninth and other circuits, also cited by the dissenting judge, stating that in such circumstances it is the duty of the trial court to direct a verdict of acquittal and of an appellate court to reverse a judgment of conviction. Substantially the same argument and the same authorities were invoked in *Curley* v. *United States,* 160 F. 2d 229 (C.A. D.C.), certiorari denied, 331 U. S. 837. Judge Prettyman, writing for the majority in that case, traced the history of the oft repeated language which petitioner insists reflects the correct rule

governing the function of the trial judge in passing upon a motion for a directed verdict [2] and of an appellate court in reviewing the correctness of his denial of the motion, and concluded (pp. 232-233)—

> The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter. * * *

The "function of determining reasonable doubt vel non," Judge Prettyman continued, "is the jury's function, provided the evidence is such as to permit a reasonable mind fairly to reach either of the two conclusions," i.e., guilt or innocence (p. 233). Otherwise, if the judge were required "to direct acquittal whenever in his opinion the

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[2] Now a motion for judgment of acquittal. Rule 29 (a), F. R. Crim. P.

evidence failed to exclude every hypothesis but that of guilt, he would preempt the functions of the jury" (*ibid.*). The confusion engendered by the line of cases upon which the appellant in the *Curley* case and petitioner here rely arose, Judge Prettyman pointed out, because of "a failure to observe in some cases the clear difference between the tests applicable to a motion for a directed verdict and the tests by which a jury must determine its verdict" (*ibid.*) He showed that the rule requiring the exclusion of every hypothesis but that of guilt was originally used in charges "as a correct exposition of the law applicable to the jury,"[3] but that in later years some courts, without analyzing the genesis of the rule or distinguishing between the standards applicable to the jury in deciding guilt or innocence and those governing the court in determining whether a case should be submitted to the jury as the judges of the facts and of guilt or innocence, erroneously recited the rule as a stricture controlling the court's determination in passing upon a motion for a directed verdict (pp. 234-235). And so, as Judge Prettyman acknowledged, this application of the rule seemingly gained authority through repetition in many cases upon which Curley relied, including those cited by petitioner here as in conflict with the decision below.

We submit that Judge Prettyman's analysis of

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[3] Such a charge was given here (*supra*, pp. 8-9).

this question in the *Curley* case, which the majority below adopted (R. 432-433), is correct. Furthermore, as we argued in our brief in opposition in that case (Nos. 1211 and 1235, O.T. 1946, pp. 20-21), it would seem that the question is no longer debatable. In *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, the respondent McElroy had moved for a directed verdict at the close of the case. He urged here that the denial of his motion and the Court of Appeals' holding that there was no error in such denial were erroneous because there was no substantial evidence that he had knowledge of and participated in the unlawful conspiracy, and he invoked the doctrine upon which petitioner here relies (see Supplemental Brief on behalf of McElroy, Nos. 346-347, O.T. 1939). In holding that there was no error in the denial of McElroy's motion, this Court said (310 U. S. at 254):

> * * * A question of law is thus raised, which entails an examination of the record, not for the purpose of weighing the evidence but only to ascertain whether there was some competent and substantial evidence before the jury fairly tending to sustain the verdict. *Abrams* v. *United States*, 250 U. S. 616, 619; *Troxell* v. *Delaware, L. & W. R. Co.*, 227 U. S. 434, 444; *Lancaster* v. *Collins*, 115 U. S. 222, 225.

See also *Glasser* v. *United States*, 315 U. S. 60, 80; *Gorin* v. *United States*, 312 U. S. 19, 32; *Pierce* v. *United States*, 252 U. S. 239, 251-252; *Stilson* v.

United States, 250 U. S. 583, 588-589. We think it is evident that if substantial evidence is the proper test by which to judge the action of the trial judge in permitting a case to go to the jury, it is the proper test for the trial judge to apply on a motion for a judgment of acquittal.

We also pointed out in our brief in opposition in the *Curley* case (pp. 22-23) that almost every Court of Appeals in the country, including those which petitioner asserts apply a standard different from that adopted below, has held, in cases decided subsequent to those cited by petitioner, that in situations where a finding of guilt depends on the inferences to be drawn from the circumstances proved, the determination whether such circumstances are sufficient to establish guilt beyond a reasonable doubt is for the jury and not for the court.[4] We argued, therefore, that if there ever

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[4] *Morton* v. *United States*, 147 F. 2d 28, 30 (C.A. D.C.), certiorari denied, 324 U. S. 875; *Yoffe* v. *United States*, 153 F. 2d 570, 573 (C.A. 1); *United States* v. *Valenti*, 134 F. 2d 362, 364 (C.A. 2), certiorari denied, 319 U. S. 761; *United States* v. *Picarelli*, 148 F. 2d 997, 998 (C.A. 2); *United States* v. *Brandenburg*, 155 F. 2d 110, 112 (C.A. 3); *United States* v. *Reginelli*, 133 F. 2d 595, 599 (C.A. 3), certiorari denied, 318 U. S. 783; *Roberts* v. *United States*, 151 F. 2d 664, 665 (C.A. 5); *Whaley* v. *United States*, 141 F. 2d 1010 (C.A. 5), certiorari denied, 323 U. S. 742; *Blalack* v. *United States*, 154 F. 2d 591, 594 (C.A. 6), certiorari denied, 329 U. S. 738; *United States* v. *Levy*, 138 F. 2d 429, 430-431 (C.A. 7), certiorari denied, 321 U. S. 770; *Braatelien* v. *United States*, 147 F. 2d 888, 893 (C.A. 8); *Hansbrough* v. *United States*, 156 F. 2d 327, 329 (C.A. 8); *Scott* v. *United States*, 145 F. 2d 405, 408 (C.A. 10), certiorari denied, 323 U. S. 801; *Rogers* v. *United States*, 129 F. 2d 843, 844 (C.A. 10).

was a conflict between circuits, it has long since been resolved.

Neither is there a conflict of decisions in the Ninth Circuit. The recent decision of the court below in *Karn* v. *United States,* 158 F. 2d 568, upon which petitioner relies, is not inconsistent with its decision here. That was a prosecution for larceny. In reversing the conviction, the court pointed out that the only evidence tending to link the money found in the defendant's possession with the money stolen from the burglarized premises consisted of the testimony of a bartender that a soiled ten dollar bill found on the defendant was "similar" to a bill he had seen among the missing money. But there was other prosecution evidence that the defendant had borrowed a sum of money the night the money was stolen, that although the defendant had been in the bar that night, he left early in the evening, and that several employees of the bar knew that, contrary to the usual custom, the day's receipts were left in the cash registers when the bar was closed at 1:00 a.m. The court stated at the outset of its opinion that it "recognized the rule announced in *Banks* v. *United States,* 9 Cir., 147 F. 2d 628 that if there be some competent and substantial evidence to sustain the verdict, we must affirm. We have carefully examined this record and we find no evidence of this character." Then followed the passage upon which the dissenting

judge below and petitioner rely as stating the correct standard to be applied in weighing the sufficiency of circumstantial evidence to support a conviction (158 F. 2d at 569-570). The court characterized the testimony of the bartender as "so vague and unsatisfactory as to create a reasonable doubt that the said bill was a part of this Chena Bar money" (p. 571). The court did not "question the right of the prosecution to prove such matters by circumstantial evidence if such evidence be sufficient to create a legitimate and sustainable inference of guilt, which satisfies beyond a reasonable doubt the minds of the jurors. But the evidence here offered to show that the ten dollar bill *was* the identical bill that Hill had seen in the cash register prior to the theft was so vague and unconvincing that it loses all probative weight in a case like this. It fails in respect to being convincing proof of the fact it sought to establish. The testimony of Hill regarding this bill reflects too much guesswork and uncertainty" (p. 572). The actual decision, therefore, was that there was no substantial evidence to sustain the verdict. Any doubt which this decision may have engendered as to the standard applied in the Ninth Circuit was removed by its later decision, en banc, in *McCoy* v. *United States,* 169 F. 2d 776, certiorari denied, 335 U.S. 898, where the rule as to the exclusion of every hypothesis but that of guilt was again invoked by the appellant. In affirming the action of the trial court in denying a

motion for a judgment of acquittal, the court below said (p. 783):

> * * * But we cannot say, as this court said in *Karn* v. *United States*, 9 Cir., 158 F. 2d 568 (referred to herein under another subhead), that there is no evidence to sustain the verdict nor can we say that as a matter of law the evidence is as consistent with innocence as with guilt. The trial court did not think so. The jury thought the evidence as a whole established the guilt of appellant beyond a reasonable doubt. We hold that the court committed no error as to this subheading.

The court thus followed the true rule clearly articulated in the *Curley* case and reiterated in the instant case that where the evidence is such that reasonable minds might fairly conclude guilt beyond a reasonable doubt, it is the jury's function to determine reasonable doubt *vel non,* even though the proof does not, in the opinion of the trial judge or the appellate court, exclude every hypothesis but that of guilt.[5]

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[5] The excerpts from the *McCoy* opinion quoted by the dissenting judge below (R. 440, 441) appear in the court's discussion of McCoy's contention that the trial judge erred in declining to give his proffered instruction on the subject of circumstantial evidence. The court held (169 F. 2d at 784-787) that the instructions given fully protected McCoy's rights and it was in this connection that the court adverted to its earlier decisions in the *Karn* case and *Ferris* v. *United States,* 40 F. 2d 837. It said that those cases involved the sufficiency of the evidence to support the verdicts and that neither of them was inconsistent with its holding that the instructions given in McCoy's case were sufficient. We do not read these remarks as approving the quotation from the

We submit that the evidence here reasonably permitted "a verdict of acquittal or a verdict of guilt." The decision was therefore "for the jury to make. In such case, an appellate court cannot disturb the judgment of the jury." *Curley* v. *United States,* 160 F. 2d at 237. See also *United States* v. *Knight,* 336 U. S. 505, 508, and cases cited. In respect of the first count, the trial court correctly charged the jury (R. 363) that under 26 U.S.C. 2553 (*supra,* p. 3) proof of the absence of tax-paid stamps from heroin is prima facie evidence of a violation of the statute by the person possessing the drug and is sufficient to place the burden on the defendant proved to be in possession to show that the drug was actually sold, dispensed or distributed in or from a package bearing the proper internal revenue stamps. *Casey* v. *United States,* 276 U. S. 413, 418. The court also correctly

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Karn opinion concerning the necessity, in a case of circumstantial evidence, of excluding every hypothesis but that of guilt as the proper standard to be applied by an appellate court in judging the sufficiency of the evidence to support a conviction. For, consistently with its holding, quoted in the text, that the trial court did not err in denying a judgment of acquittal, the court concluded its opinion with these significant remarks (169 F. 2d at 787):

"Our method of trying those accused of crime is to submit the issue of guilt or innocence to a jury upon the evidence adduced and the applicable law as given it by the court. When the case has been submitted to the jury for decision under the instruction that guilt is only to be found in case the jury regards guilt as the only reasonable determination, the verdict should not be set aside by us unless as a matter of law we should find that there is no adequate support in the evidence for such determination. Otherwise we should be interfering with the jury's function. We cannot find such lack of support in the evidence of our case."

instructed the jury in respect of count 2 that proof of possession of the heroin was sufficient evidence under the statute (21 U.S.C. 174,*supra,* p. 2) to authorize conviction of the defendants shown to have had possession, in the absence of an explanation satisfactory to the jury (R. 364). The fingerprint evidence, which the court below characterized as "the strongest kind of evidence" (R. 435), showed that petitioner's print had been placed on one of the envelopes containing the heroin not more than four weeks prior to the expert's examination of the package and its contents. The expert was positive in his testimony that the print was impressed on the envelope at a time when it contained a powdery substance. Since heroin is a powdery substance, it is a reasonable inference from this evidence that at the time petitioner had the envelope in his possession it contained the heroin later seized by the agents. By the same token, it is unreasonable to speculate, as petitioner does (Pet. 12), that his print may have been placed on *this particular envelope* under a multitude of innocent circumstances. As the trial judge remarked in the course of argument on petitioner's motion for a new trial (R. 401):

> Isn't this the rational inference to draw: That if at the time the defendant had it [the envelope] in his possession there was a powdery substance in it, and when captured by the officers it had a powdery substance, which consisted of heroin, isn't it rational to

draw the inference that at the time the defendant had it in his possession it had heroin in it?

Both the District Court and the Court of Appeals have determined that there was "competent and substantial evidence before the jury fairly tending to sustain the verdict" (*United States* v. *Socony-Vacuum Oil Co., supra,* p. 12). We submit, therefore, that there is no occasion for further review of this question by this Court. See *Kann* v. *United States,* 323 U. S. 88, 93; *United States* v. *Johnson,* 319 U. S. 503, 518; *Delaney* v. *United States,* 263 U. S. 586, 589-590.

2. Petitioner's contention (Pet. 15-19) that Greene's statements described above (pp. 6-7) constituted reversible error is clearly without merit. Not only was Greene stopped before he completed the statements but the jury were instructed immediately after the first incident and again in the final instructions to disregard the statements. Accordingly, the court below was right in holding that the incidents "had no substantial adverse effect upon the fairness of the trial" (R. 437). See *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 243.[6]

3. Petitioner did not specifically raise the question of venue in the trial court, but claims that his motion for a judgment of acquittal was sufficient to present the question, and he argues that venue

[6] The dissenting judge below did not disagree with the holdings on this point and petitioner's contention that venue was not proved.

as to him was not shown (Pet. 19-21). It is a general rule, as the court below pointed out (R. 437), that any objection to venue is waived by going to trial on the merits. The Seventh Circuit recently held in *United States* v. *Jones,* 174 F. 2d 746, 748, upon which petitioner relies, that a motion for acquittal challenges the sufficiency of the evidence to establish the Government's case, of which venue is an essential part, and is therefore sufficient to raise the question of venue. But that case does not avail petitioner, for the reversal of the conviction for selling narcotics not in pursuance of a written order of the purchaser (26 U.S.C. 2554(a)) was on the ground that there was a total lack of evidence to show where the sale occurred (*id.,* 749). In the instant case, on the other hand, there was positive evidence that the offenses charged occurred in Oakland, California (e.g., R. 74-75), which the court judicially knew is within the Northern District of California.

In any event, it is settled, and there is nothing in the opinion in the *Jones* case, *supra,* to the contrary, that the presumptions arising from possession contained in 26 U.S.C. 2553 and 21 U.S.C. 174 extend also to venue. *Casey* v. *United States,* 276 U. S. 413, 417-418; *Mullaney* v. *United States,* 82 F. 2d 638, 641 (C.A. 9); *Acuna* v. *United States,* 74 F. 2d 359, 360 (C.A. 5).[7] Hence, the proof that

[7] *Brightman* v. *United States,* 7 F. 2d 532 (C.A. 8), cited by petitioner (Pet. 20), and other earlier cases holding to the contrary, were disapproved in the *Casey* case, *supra.*

petitioner had had possession of the heroin was sufficient to establish venue in the Northern District of California, where it was seized by the agents. Petitioner cannot escape the impact of this rule by arguing, as he does (Pet. 20), that there was no proof that he had possession of the heroin in the Northern District of California. For there was evidence that it had been brought to California from New York by Sapoli and that petitioner's co-defendant's source of supply was from New York (R. 77, 210-212). There was thus a sufficient basis for an inference that petitioner was an aider and abettor of the defendants in California in the commission of the offenses charged in the first and second counts.[8] As such he was guilty as a principal (18 U.S.C., 1948 rev., 2), even though he may have been outside the Northern District of California at the time the heroin was found in the possession of his co-defendants. In such circumstances, venue of a prosecution of an aider and abettor is properly in the district where the offense was committed. *Eley* v. *United States,* 117 F. 2d 526 (C.A. 6); *Hoss* v. *United States,* 232 Fed. 328 (C.A. 8).

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[8] The trial judge correctly charged the jury on the law as to aiding and abetting and the commission of crime through the agency of another person (R. 366-367).

CONCLUSION

The case was correctly decided below and there is no real conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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OCTOBER, 1950.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1950

No. 264

JOHN STOPPELLI,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION AND BRIEF IN SUPPORT OF APPLICATION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM 1950

No. 264

JOHN STOPPELLI,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully prays that this Court reconsider its determination made on October 23, 1950, which denied his petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review a judgment convicting the petitioner of the crimes of unlawfully selling, dispensing and distributing a quantity of heroin, in violation of 26 U. S. Code, Sections 2553 and 2557, and concealing and facilitating the concealment of heroin, in violation of 21 U. S. Code, Section 174, which respective sections of the Code of the U. S. Code are known as the Harrison Narcotic Act and the Jones-Miller Act. Petitioner respectfully requests permission to file this application at this time.

Your petitioner respectfully submits that there is presented in this case a serious and important question involving the construction of the above-noted statutes not heretofore passed upon by this Court, and which should be passed upon by this Court, a question which is bound to have increased importance in the future, not only with regard to the particular situation here presented, but other situations of like kind. This matter pertaining to the construction of the Federal statutes involved was not heretofore directly and adequately presented.

The basic reason which compels counsel for the petitioner to make this application for a rehearing is that counsel are completely in accord with the dissenting opinion of the Chief Judge of the Court of Appeals for the Ninth Circuit which heard this case below, that the conviction of the defendant in this case rests upon principles which are "abhorrent to the Anglo Saxon sense of justice" (R. 440).

The primary question which this appeal raises involves a construction of the meaning of the word "possession" and the character of the proof which as a matter of law must be established to prove "possession" before a presumption of guilt of a crime may be drawn under the Harrison Narcotic Act and the Jones-Miller Act, the text of which was set forth at page 6 of the original petition for writ of certiorari. As stated by the Chief Judge of the Court of Appeals in his dissent, the issue here is whether your petitioner Stoppelli ever was in possession of the narcotic, for such possession if unexplained by him warrants the inference that he participated in its attempted sale and the concealment charged in the indictment (R. 438-439). In this case, the sole basis for the conviction of defendant was the fact that a partial fingerprint was found on an envelope, later found to contain heroin. On this single isolated circumstantial fact, completely unsupported by any other direct or circumstantial evidence, the defendant was convicted of the crime charged. There was not the sligthest evidence from which the jury could infer

that Stoppelli had any connection of any character whatsoever with any co-defendant or with any sale or concealment other than by way of the finding of this single isolated fingerprint. It is doubtful whether any case could ever come to this Court on a narrower question stripped of any involvements pertaining to the general sufficiency of evidence to which this Court normally denies a review. There is no *direct* evidence that heroin was in the envelope when the defendant touched it. And there is no circumstantial evidence indicating that there must have been heroin in the envelope at that time. There is nothing but a conjecture on the part of one anxious Government witness that there may have been a powdery substance in the envelope at that time. That witness testified directly that he did not know in fact what was in the envelope (R. 291). The witness' opinion that there may have been a powdery substance in the envelope was based upon the alleged concavity of the fingerprint found, but he did not state that this concavity could not be otherwise caused. It is your petitioner's contention that the Chief Judge of the Court of Appeals below was entirely correct in stating that as a matter of law this limited evidence was not sufficient to prove beyond a reasonable doubt that the defendant "possessed" at any time the narcotics found in an envelope contained in another envelope on which the fingerprint was found. There is no evidence as to where this outer envelope came from and the Government's expert testified that the fingerprint might have been placed on the envelope any time up to a period of five weeks preceding the finding of the fingerprint by the Government (R. 285). There is no evidence that defendant was ever near the envelopes when they were filled with heroin, and the record indicates (R. 205-213) that heroin was brought to California in bulk, and not in envelopes; and there was not the slightest evidence that the defendant was ever in California prior to the time that he surrendered himself after the indictment.

The defendant was convicted upon a presumption drawn upon an assumption of possession. It is respectfully submitted that the Government failed as a matter of law to prove that the defendant was ever in "possession" of the narcotics so as to warrant the presumption of his guilt of the crimes charged. It is submitted that the presumption allowed by the Harrison Narcotic Act and the Jones-Miller Act can come into or take effect only when the "possession" is proved beyond a reasonable doubt. As will be more fully pointed out in our brief hereinafter set forth, it was held by the New York Court of Appeals in an analogous situation, that a presumption of crime based upon proof of possession requires that the proof *"conclusively"* establish possession.

The presumption allowed by the statutes is a *substitute* for evidence of proof of guilt beyond a reasonable doubt in a criminal case. It is submitted that before the inference of guilt arising from the presumption may be drawn, the basic fact upon which the inference rests must at least be proved beyond a reasonable doubt. Any doctrine to the contrary does severe violence to our Anglo-Saxon concepts of jurisprudence, and may well constitute a denial of due process of law and result in an unwarranted deprivation of life and liberty. The fate of this particular petitioner is perhaps a matter of relatively little significance, excepting unto himself and his next of kin, but the preservation of our system of jurisprudence and our historical concepts of justice is of tremendous significance to all of the citizens and other inhabitants of this country. If our Anglo Saxon concept of justice which requires proof of guilt beyond a reasonable doubt in any criminal case is to be so flimsily set aside, our common law heritage which presumes an accused innocent until proven guilty beyond a reasonable doubt means very little.

In view of the sharp dissent in this Supreme Court on the question of the constitutionality of the Harrison Narcotic Act and the Jones-Miller Act insofar as this type of statute permits an inference or presumption of guilt

of crime arising from the mere fact of possession alone (*Casey* v. *U. S.*, 413), it would seem that an interpretation of the Acts involved pertaining to the meaning of the word "possession", and the character of the evidence necessary to establish that possession as a matter of law, should be passed upon by this Court at this time. Although this Court has held that the Harrison Narcotic Act and the Jones-Miller Act are not unconstitutional, insofar as they permit an inference of guilt arising from possession, this Court has not passed upon the question as to the meaning of or the character of the proof requisite to establish as a matter of law, "possession".

The question at issue involves a substantial point of criminal law and procedure, of a character not infrequently arising in Federal Courts. It is desirable that the matter be clarified by a primary review, to the end, that the law be settled and the Federal statutes not be misinterpreted, and more specifically that this petitioner should not be made to suffer the further consequences of an unjust conviction.

Your petitioner therefore respectfully asks that a rehearing be granted herein, that the determination of this Court denying the writ of certiorari be set aside, and that such a writ be granted.

New York, N. Y., November 17, 1950.

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Certificate of Counsel

I hereby certify that the above petition is filed in good faith, and not for purposes of delay, and that it is restricted to the grounds specified in Rule 33.

New York, N. Y., November 17, 1950.

JACOB W. FRIEDMAN,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM 1950

No. 264

JOHN STOPPELLI,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

BRIEF ON APPLICATION FOR REHEARING

I

Without intending to detract from the force of the other arguments advanced in our original brief, we direct the Court's attention to our assertion that the Government failed to sustain its burden of proving the defendant guilty beyond reasonable doubt and that this case should never have been permitted to go to a jury. As a substitute for proof, the Government relied upon the presumption of guilt arising from the "possession" of narcotics arising under the Harrison Narcotic Act and the Jones-Miller Act. It is the petitioner's contention that as a matter of law the Government failed to prove such a "possession" as permits an inference or presumption of guilt. The finding of "possession" of a narcotic by the defendant was based

upon the single isolated fact that a partial fingerprint of the defendant was found on an envelope which was later found to contain another envelope containing heroin. There is absolutely no evidence in this case that the defendant was associated with or connected in any way whatsoever with any of the other defendants with whom he was tried, or that he was in any way directly or indirectly associated in or with any transactions with the other defendants or that he even knew any of them, or for that matter that he was in any way connected with narcotic traffic. There is no direct evidence, as heretofore pointed out in our petition for a rehearing, that heroin was in the envelope when he touched it, and there is no circumstantial evidence indicating there must have been heroin in the envelope at that time. There is nothing but a conjecture on the part of an anxious Government witness that there may have been a powdery substance in the envelope at that time. That witness was forced to concede that he did not know what in fact was in the envelope (R. 291). He nowhere stated that the concavity could not be otherwise caused. There was no evidence that the defendant was ever near the envelopes when they were filled with heroin. The record shows that the heroin came to California in bulk, and not in envelopes (R. 205-13). There was no evidence to show that the defendant was at any time in California prior to the time of his indictment and surrender upon such indictment. And the Government's own proof shows that such fingerprint might have been placed on the envelope at any time up to a period of five weeks preceding the discovery of the fingerprint. To state that this kind of evidence establishes "possession" of a narcotic within the meaning of the Harrison Narcotic Act and the Jones-Miller Act does severe violence to our concepts of justice. As stated by the Chief Judge of the Court of Appeals, in his dissent below, "It is abhorrent to the Anglo-Saxon sense of justice that in such a situation the Government's burden of proof beyond a reasonable doubt is established or the presumption of innocence is overcome".

Where a "presumption" is a substitute for proof of guilt beyond a reasonable doubt, the *basic fact* upon proof of which the presumption is to go into effect should at least be proved beyond any reasonable doubt. Here, the basic fact is "possession"; and that, at least, should be proved beyond any reasonable doubt before any inference of guilt based upon possession is warranted. In an analogous situation, the New York Court of Appeals has held that before an inference or presumption of guilt may be drawn, or come into effect, by virtue of "possession" of policy slips, the basic fact of possession must first be "conclusively" proved (*People* v. *Levitt*, 301 N. Y. 113). In this analogous situation, the Court said, "Since possession in itself is made a criminal offense it is essential that defendant's possession be 'conclusively' shown (*People* v. *Wolosky*, 296 N. Y. 236, 238; *People* v. *Rosen*, 294 N. Y. 761; *People* v. *Leon*, 262 N. Y. 664)."

In *Casey* v. *U. S.*, 276 U. S. 413, the majority of this Court upheld as constitutional that portion of the Harrison Narcotic Act which permits inference of guilt based upon "possession" as a permissible shifting of the burden of proof. This, against the views of the strong dissenting minority. In *Casey* v. *U. S.* the Court said, "With regard to the presumption of the purchase of a thing manifestly not produced by the possessor, there is a 'rational connection between the fact *proved* and the ultimate fact presumed' ". (Italics ours.) Petitioner and the members of the bar are entitled to assume that the word "proved" means proved beyond a reasonable doubt, and that the inference of guilt arising from "possession" may not be drawn unless at least that fact is proved beyond a reasonable doubt.

II

Where the evidence tending to prove the basic fact of "possession" is circumstantial, it must exclude every reasonable hypothesis of innocence, or violence is done to our Anglo-Saxon concepts of jurisprudence, which would be tantamount to a denial of due process and an unconstitutional deprivation of life and liberty. As pointed out by the Chief Judge of the Court of Appeals, in his dissent below, a single isolated fact of the existence of a fingerprint which could have found itself upon the envelope under any number of innocent circumstances in the absence of any other evidence, direct or circumstantial, tying up the defendant with the crime charged is insufficient as a matter of law to permit the presumption or inference to take effect. As stated by him, "There is not the slightest evidence from which the jury could infer that Stoppelli had any connection with any co-defendant or with the sale or concealment other than the single fingerprint hereafter discussed" (R. 439). He forcefully stated that to permit a case to go to the jury on this limited evidence of "possession" was "abhorrent to the Anglo-Saxon sense of justice".

Where a single circumstantial fact warrants the inference of innocence as much as it warrants one of guilt, an appellate court must set aside the judgment of conviction. Unless every reasonable hypothesis of innocence is excluded, the basic fact of "possession" has not been proved. To permit an inference of guilt to be drawn upon an *assumption* of possession constitutes an unwarranted and dangerous extension of a doctrine of criminal law which can only be described as "abhorrent", and a complete elimination of the requirement that the Government must prove one accused of crime guilty beyond a reasonable doubt. It constitutes a complete wiping out of the pre-

sumption of innocence with which every person is cloaked by our system of jurisprudence.

As stated by the Court of Appeals of the State of New York, in a somewhat analogous situation involving circumstantial evidence, "If in a criminal case, 'circumstantial evidence is to be given legal effect, the facts from which the inference of guilt is drawn must themselves be proved, not assumed; the controlling inference must be clear and strong, pointing logically to defendant's guilt and excluding to a moral certainty every other reasonable hypothesis'" (*People* v. *Taddio,* 292 N. Y. 488). In our original petition, we set out a number of cases in the Federal courts asserting this very sound basic doctrine of criminal law (pp. 9-11).

The necessity for a statutory interpretation of the Harrison Narcotic Act and the Jones-Miller Act which call for proof of "possession" that is inconclusive, or at least proved beyond any reasonable doubt, is particularly pointed up in this case where the inference of a guilty and criminal possession was unlawfully implemented by the Government's improper introduction of evidence clearly indicating the defendant was a narcotics peddler guilty of other crimes (R. 253-254, 265; briefed in our original petition at pp. 15-19). This, when the defendant did not take the stand and his character was not otherwise in issue.

The majority below has taken the position that it should not review a case unless it feels "the jury could not reasonably draw an inference of guilt". If this rule is to stand, particularly with regard to a basic fact such as possession, the doctrine of reasonable doubt is completely destroyed because in every case there is some evidence from which guilt can be inferred.

Conclusion

For the foregoing reasons, as well as those stated in the original petition and brief, petitioner respectfully urges this Court to rescind its determination of October 23, 1950, denying his petition for a writ of certiorari, and that it grant such writ to the United States Court of Appeals for the Ninth Circuit to review the conviction herein.

New York, N. Y., November 17, 1950.

Respectfully submitted,

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